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August 8, 1994

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, NW
Washington, DC 20554

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AUG 8 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: CC Docket No. 94-65

Dear Mr. Caton:

Enclosed herewith for filing are the original and four (4) copies of MCI Telecommunications Corporation's Comments in the above-captioned proceeding.

Please acknowledge receipt by affixing an appropriate notation on the copy of the MCI Comments furnished for such purpose and remit same to the bearer.

Sincerely yours,

Elizabeth Dickerson by JCF

Elizabeth Dickerson
Manager, Federal Regulatory

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

AUG 8 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

1994 Annual Access Tariff Filings

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CC Docket No. 94-65

COMMENTS

MCI Telecommunications, Inc. ("MCI") hereby submits its comments in response to two separate pleadings filed on July 25, 1994, stemming from the Memorandum Opinion and Order Suspending Rates which the Commission released June 24, 1994.¹ Southwestern Bell Telephone Company's ("SWBT's") Petition for Clarification or Reconsideration ("Petition") and AT&T's Application for Review ("Application"). In relevant part, SWBT seeks clarification of the section of the 1994 Annual Access Part I in which the Commission declined to permit exogenous treatment of new regulatory fees.² AT&T also seeks reversal of the Orders, and seeks an exogenous cost reduction necessitated by the termination of the amortization of the non-capitalized equal access costs of the Bell Operating Companies ("BOCs") and GTE.³ Because both pleadings address the standards

¹ See 1994 Annual Access Tariff Filings, CC Docket No. 94-65, Memorandum Opinion and Order, DA 94-706, released June 24, 1994 ("1994 Annual Access Part I"); 1994 Annual Access Tariff Filings, CC Docket No. 94-65, Memorandum Opinion and Order, DA 94-707, released June 24, 1994 ("1994 Annual Access Part II"); collectively, "the 1994 Annual Access Orders."

² SWBT Petition, p. 1.

³ AT&T Application, pp. 1-2.

the Commission has adopted for a cost to qualify for exogenous treatment and the methods in place by which such exogenous treatment can be attained, MCI is responding to these pleadings together. For the following reasons, MCI urges the Commission to reject SWBT's Petition and to grant AT&T's Application to the extent indicated herein.

I. Reconsideration of the Commission's Clearly Articulated Exogenous Cost Policy Is Inappropriate and Clarification Is Unnecessary.

The 1994 Annual Access Orders correctly denied exogenous treatment to Bell Atlantic and NYNEX for the Commission's new regulatory fees. In its Petition, SWBT argues that it has "not always been required to file petitions for waiver to allow for exogenous cost treatment of items included under Section 61.45(d)(1)(vi)";⁴ and it characterizes the United Depreciation Order⁵ as lacking any "discussion of whether the petition for waiver was the required method to raise the question" of exogenous treatment.⁶ SWBT has reached an erroneous conclusion. The Commission's December 1993 United Depreciation Order held that, since general depreciation rate changes are treated endogenously under price caps, United used the correct procedural device by seeking waiver of the Commission's rules when it sought exogenous treatment for plant-related

⁴ SWBT Petition, pp. 2-3.

⁵ Petition for Waiver of the Commission's Rules to Recover Network Depreciation Costs, 9 FCC Rcd 377 (1993) ("United Depreciation Order").

⁶ SWBT Petition, p. 2, n.5.

expenses.⁷ There is no logical basis for distinguishing between costs previously denied exogenous treatment (e.g., depreciation expenses) and those costs not specifically granted exogenous treatment to date (e.g., "other extraordinary exogenous changes as the Commission shall permit or require."⁸ The relevant similarity between these two categories of costs is that the rules require them to be treated endogenously, unless and until the Commission deems otherwise, e.g., through rulemaking or waiver. This procedural requirement is fully consistent with the Commission's careful review in the LEC Price Cap Order⁹ of what should be given exogenous treatment. The notice and comment provisions associated with both rulemakings and waivers ensure that all interested parties have an opportunity to debate the merits of exogenous treatment. The tariff process, in contrast, places the onus on interested parties to identify the tariff, review the exogenous claim, and file a petition within 15 days.¹⁰ The Commission is correct to reject exogenous claims until a cost is declared to be exogenous in some other forum that confers the fullest due process on all affected parties.

Even had these carriers appropriately petitioned for waiver of the Commission's exogenous cost rules, their requests likely would not have passed

⁷ United Depreciation Order, 9 FCC Rcd at 386.

⁸ 47 C.F.R. 61.45(d)(1)(6) (emphasis added).

⁹ Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990) ("LEC Price Cap Order"), recon 6 FCC Rcd 2637 (1991) ("LEC Price Cap Reconsideration Order").

¹⁰ See 47 C.F.R. 1.773(a)(2)(iv).

the standard for waiver that the Commission explicitly articulated in the United Depreciation Order. To receive relief from the Commission rules in effect, not only must the petitioning party meet the Commission's "previously articulated" test for exogenous treatment (e.g., that "the cost change is (a) the result of regulatory action beyond the control of the carrier, and (b) not already reflected in the price cap formula"¹¹), but the United Depreciation Order also requires "a showing of some other unique circumstances, such as hardship or inequity, to justify deviation from the rules for that particular case, and must further demonstrate that such deviation better services the public interest."¹² The Commission reiterated that though it may grant exogenous treatment to "some changes in costs triggered by regulatory action beyond the control of the carriers . . . [it has] stressed that 'not all changes in costs beyond the control of the carrier are likely to result in unreasonably high or low rates, or to otherwise be appropriate for exogenous treatment.'"¹³ In this case, there was no showing that payment of fees would result in rates that were unreasonably low, absent exogenous adjustment. In fact, it is highly unlikely that the LECs could make such a showing since regulatory fees apply to all carriers -- including nondominant carriers who, because they must compete with each other and with the LECs, cannot automatically pass through

¹¹ United Depreciation Order at p. 388.

¹² United Depreciation Order at p. 389.

¹³ United Depreciation Order at p. 387, citing Employers Accounting for Post-retirement Benefits Other than Pensions, Memorandum Opinion and Order, 8 FCC Rcd 1024 (para. 47) (1993), rev'd and remanded, Southwestern Bell Telephone Co. v. FCC, No. 93-1168 (D.C. Cir. decided July 12, 1994).

these increased fees to their customers.

II. The Commission Should Grant AT&T's Application for Review and Designate as Exogenous the Completed Amortization of Non-Capitalized Equal Access Expenses.

AT&T seeks full Commission review of the Bureau's 1994 Annual Access Filing Orders that allows "LECs to continue to include fully amortized equal access costs in the[ir] PCIs."¹⁴ Specifically, the Bureau reasoned that the Commission's earlier rejection of exogenous treatment for ongoing equal access conversions costs also "precluded exogenous treatment of the amortization of those costs."¹⁵ Further, the Bureau argued, even if such relief were warranted, it was "unavailable in the absence of a Commission rulemaking or Commission action granting a LEC waiver request to implement a reduction in its price cap indexes to account for that cost change."¹⁶

In its petition to suspend and investigate the LECs' 1994 annual access tariff filings, MCI urged the Commission to pursue a tariff investigation in order to determine whether it should accord exogenous treatment to those costs.¹⁷ MCI believes that the expiration of the equal access amortization should be treated the same as the expiration of the other amortizations that were underway at the

¹⁴ AT&T Application, at p. 6.

¹⁵ AT&T Application, p. 6, citing LEC Price Cap Order, 5 FCC Rcd at 6808.

¹⁶ AT&T Application, p. 7.

¹⁷ 1994 Annual Access Tariff Filing, Petition to Suspend and Investigate, CC Docket No. 94-65, MCI Petition to Suspend and Investigate, filed April 26, 1994.

initialization of price cap rates at July 1990 levels: Section 61.45(d)(i) and (viii) accord exogenous treatment to the completion of the amortization of depreciation reserve deficiencies and inside wire amortizations, respectively.

The Commission addressed the issue of requiring exogenous treatment of the expiration of the amortization of equal access expenses in the LEC Price Cap Reconsideration Order.¹⁸ In that order, the Commission declined to mandate exogenous treatment, "based on the meager factual record presented on the issue of equal access costs."¹⁹ Thus, the Commission's decision not to require automatic exogenous treatment of this expiration was based on the lack of record before it.

AT&T correctly points out that the issue presented in the LEC Price Cap Reconsideration Order was "whether the BOCs will experience any cost change in 1994 that stems from factors beyond their control"²⁰ In fact, there is a reduction in the LECs' costs which results from the completion of a Commission-mandated amortization, and not from productivity-enhancing efforts undertaken by the LECs. Failure to reflect the termination of this amortization will unduly penalize the LECs' customers by effectively allowing continuing recovery of equal access expenses for which a limited recovery mechanism was initiated while the LECs still operated under rate-of-return regulation. Thus, exogenous treatment of the

¹⁸ LEC Price Cap Reconsideration Order at 2667.

¹⁹ Id. at 2667 (n.77).

²⁰ AT&T Application, p. 9, citing LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2667 (n. 77).

removal of the equal access amortization is both correct policy and, after the additional development of the record which would occur in a rate investigation, fully consistent with the Commission's announced policy on exogenous changes.

If the Commission believes, in light of the recent D.C. Circuit Court decision on exogenous treatment of OPEB,²¹ that it cannot resolve exogenous treatment of equal access amortizations in a tariff investigation, it must find some other procedural vehicle to do so. In comments in CC Docket 94-1, MCI and others recommended exogenous treatment of the expiration of this amortization.²² At the very least, the Commission should address this issue expeditiously in the price cap review docket.

III. Conclusion

The LECs' 1994 Annual Access Filings provide a casebook example of the LECs' wanting pure price caps when it is to their advantage, but quickly seeking cover under the "exogenous" shield when any historical revenues are put at risk. Here, the LECs seek cost recovery for regulatory fees, but they struggle to retain the benefits of a recovery mechanism created for the amortization of equal access costs even though they all admit they have fully recovered such costs. The LECs

²¹ Southwestern Bell Telephone Company v. FCC, Case No. 93-1168 (D.C. Cir. decided July 12, 1994) (resolution of tariff investigation in this case failed to apply the criteria for exogenous cost treatment -- suggesting that tariff investigations cannot be the source of new substantive decisions, and are limited to application of existing law).

²² Price Cap Performance for Local Exchange Carriers, CC Docket No. 94-1, MCI Comments, p. 48.

simply cannot have it both ways. The Commission should affirm the Bureau's treatment of regulatory fee changes and reexamine its policy on the exogenous treatment of the equal access amortization.

For the foregoing reasons, MCI urges the Commission to reject SWBT's Petition in relevant part, and grant AT&T's Application for Review to the extent indicated herein.

Respectfully submitted,
MCI TELECOMMUNICATIONS CORPORATION


Elizabeth Dickerson by JCF

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August 8, 1994

STATEMENT OF VERIFICATION

I have read the foregoing and, to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on August 8, 1994.


Elizabeth Dickerson
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CERTIFICATE OF SERVICE

I, Gwen Montalvo, do hereby certify that copies of the foregoing MCI's Comments were sent via first class mail, postage paid, to the following on this 8th day of August 1994:

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